IN THE

Supreme Court of the United States

October Term, 1976

No. .....

——76-9771

VOLVO OF AMERICA CORPORATION,

Petitioner,

vs.

THE HONORABLE WILLIAM W. SCHWARZER, Judge, United States District Court for the Northern District of California,

Respondent.

CHARLENE P. ROSACK, individually, and on behalf of all others similarly situated,

Real Parties in Interest.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PAUL, HASTINGS & JANOFSKY,
DANIEL H. WILLIAMS, III,
DOUGLAS C. CONROY,
ROBERT S. SPAN,
555 South Flower Street, 22nd Floor,
Los Angeles, Calif. 90071,
(213) 489-4000,
Attorneys for Petitioner
Volvo of America Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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THE HONORABLE WILLIAM W. SCHWARZER, Judge, United States District Court for the Northern District of California,

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CHARLENE P. ROSACK, individually, and on behalf of all others similarly situated,

Real Parties in Interest.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioner, Volvo of America Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 11, 1976.

Opinion Below.

The unpublished opinion of the Court of Appeals appears in the Appendix hereto. The unpublished opin-

ion rendered by the District Court for the Northern District of California appears in the Appendix hereto. Additionally, the unpublished findings and conclusions of the United States Magistrate to whom the remand proceedings were originally referred, appears in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 11, 1976. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented.

1. Can this Court's holding in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L.Ed.2d 542 (1976), be circumvented by the simple invocation of 28 U.S.C. §1447(c) in a remand order, even though the grounds stated for remand are not authorized by §1447c?

2. Is this Court's holding in *Thermtron* to be construed as applicable only to the unique facts of that case, or is it to be given an interpretation consonant with the spirit of the majority opinion? Will this court allow *Thermtron* to be overruled *de facto* by permitting a District Court Judge to prevent review of a remand order simply by citing 28 U.S.C. §1447(c)?

3. Under 28 U.S.C. §1447(c), does the District Court have authority to remand an entire class action case to state court notwithstanding a finding by the Court that complete diversity exists, and that at least some plaintiffs have claims in excess of the jurisdictional amount?

Statutory Provisions Involved.

United States Code, Title 28:

Section 1447(c):

"If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the District Court shall remand the case, and may order the payment of just costs. A certified copy of the Order of Remand shall be mailed by its clerk to the clerk of the state court. The state court may thereupon proceed with such case."

Section 1441(a):

"Except as otherwise expressly provided by act of Congress, any civil action brought in a state court of which the District Courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the District Court of the United States for the district and division embracing the place where such action is pending."

Section 1332(a):

"The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different states; . . ."

Statement of the Case.

This case is an individual and class action originally brought in a state court in California, alleging violations of the California Anti-Trust Laws. The Petitioner, Volvo of America Corporation (hereinafter "Volvo") filed

a timely Petition for Removal, and the case was removed to the United States District Court for the Northern District of California. Removal was based on 28 U.S.C. §1332(a) and §1441(a).

Subsequent to the removal, the plaintiff moved to remand the action to State Court. The motion for remand was referred to the Honorable Owen E. Woodruff, Jr., United States Magistrate for hearing and decision. On June 8, 1976, the Magistrate submitted his findings and recommendations in which he concluded that "there is more than $10,000 in controversy in this litigation" and that "the diversity requisite to federal court jurisdiction appears to be the fact." The Magistrate's findings and recommendations appear in the Appendix hereto.

Pursuant to the local court rules, the plaintiff filed a Notice of Objections to the Magistrate's findings and recommendations, and the matter was heard before the respondent District Court Judge, the Honorable William W. Schwarzer.

The principal issue before the District Court was whether the requisite amount in controversy was present between the plaintiffs and defendants. Plaintiff purports to represent a class consisting of all persons, natural or legal, who purchased new Volvo automobiles at retail in California since January 1, 1967. Plaintiff seeks treble damages and attorneys' fees, under the authority of the applicable California statute, California Business and Professions Code §16750. It is uncontroverted that statutorily authorized treble damages and attorneys' fees are to be included in calculating the amount in controversy for federal jurisdictional purposes. *Missouri State Life Insurance Company v. Jones,* 290 U.S. 199, 202, 78 L.Ed. 267, 269 (1933).

No formal evidentiary hearing was held by the District Court to determine the existence of plaintiffs with claims in excess of the jurisdictional amount. However, at the Court's request, Volvo submitted affidavits detailing the existence of several class members who would clearly have claims in excess of $10,000. These affidavits were the result of a "spot check" of Volvo dealers in California and the list of plaintiffs included therein was not meant to be exhaustive.

On October 20, 1976, the District Court entered an order setting aside the Magistrate's findings and recommendations and remanding the action to State Court. A copy of the District Court's order appears in the Appendix. The District Court found that jurisdiction existed over at least "a few members of" the class. However, notwithstanding that finding, the Court remanded the entire action on the grounds that "the action could not be maintained in this Court on behalf of the class for which it was brought". Remand Order, page 7, lines 2 through 4.

In subsequent proceedings, the effective date of the remand order was stayed by the District Court until October 29, 1976. The express purpose of the stay was to afford Volvo an opportunity to seek relief from the United States Court of Appeals for the Ninth Circuit. In staying the order, the District Court implicitly ordered that no part of the file in the case, nor a certified copy of the remand order, be transmitted to the State Court.

On October 28, 1976, Volvo filed with the Court of Appeals a Petition for Writ of Mandamus and/or Prohibition, requesting the Court to issue a writ commanding the District Court to set aside the Order of Remand and retain jurisdiction over the action.

On the same day, the Court of Appeals entered an order staying the District Court's Order of Remand until November 12, 1976, or until further order of the Court, whichever occurred first, in order to allow a motions panel of the Court of Appeals to consider the Petition for Writ of Mandamus. Copies of the Petition for Writ of Mandamus and/or Prohibition, and the order of the Court of Appeals appear in the Appendix hereto.

On November 11, 1976 the Court of Appeals denied the Petition for Writ of Mandamus and/or Prohibition.

On November 12, 1976, Volvo applied to the Hon. William Rehnquist for a stay of the remand order pending filing of a petition for certiorari with this Court. The application was denied on November 15, 1976. A copy of Justice Rehnquist's Opinion on Chambers appears in the Appendix hereto.

REASONS FOR GRANTING THE WRIT.

I.

A Remand Order Based on Grounds Not Authorized by 28 U.S.C. §1447(c) Is Reviewable. The Mere Citation of §1447(c) Does Not Prevent Review.

The principal issue presented by this petition is whether a District Court Judge can bar review of a remand order simply by invoking 28 U.S.C. Section 1447(c), even though the grounds stated for remand are not authorized by Section 1447(c). If this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L.Ed.2d 542 (1976) is to have any meaning, a District Court Judge should not be able to circumvent the clear purpose of *Thermtron* by merely invoking the magic words "1447c."

According to *Thermtron,* the only remand orders which are immune from review are those "*issued under 1447c and invoking the grounds specified therein—that removal was improvident and without jurisdiction*" (Emphasis added) *Thermtron Products, Inc. v. Hermansdorfer, supra,* 46 L.Ed.2d at 551.

Since the District Court's opinion herein did not invoke the grounds authorized by Section 1447(c), but rather was grounded on extraneous considerations relating to class action procedures, the remand order should not be immune from review. To construe *Thermtron* in any other manner would mean that the District Court Judge in Kentucky, who remanded properly removed cases because of his heavy docket, could continue this practice simply by adding the citation "28 U.S.C. Section 1447(c)" to his opinions. Surely this Court could not have intended such a result.

This is the interpretation suggested by Justice Rehnquist in the In Chambers Opinion denying petitioner's application for a stay of the remand order (See Appendix). If certiorari is denied the instant case, Justice Rehnquist's opinion will stand as the only interpretation of the scope of the *Thermtron* ruling.

II.

The District Court's Remand Order Was Not Authorized by 28 U.S.C. §1447(c), and Constituted an Act in Excess of Its Jurisdiction.

The District Court made the finding that several plaintiffs had claims in excess of $10,000. As noted previously, this finding was not based on an exhaustive survey of all potential class members, but rather on a sampling of approximately 20% of the Volvo dealers in the state of California. Further, the District Court never specifically found that the named plaintiff, Charlene Rosack, did not have a claim in excess of $10,000. The court simply stated that such a finding would not have affected the result. Remand Order, page 6, footnote 3.

The sole ground for the District Court's order was that a majority of the purported class members would not have claims in excess of $10,000:

> "Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U.S.C. §1447(c)." Remand Order, page 7, lines 2 through 4.

The District Court's use of Section 1447c is a complete *non sequitur*. The court states that the suit must be remanded because it "could not be maintained in

this court on behalf of the class for which it was brought." Then, almost as an afterthought, the court cites 28 U.S.C. §1447(c).

Section 1447(c) authorizes remand only where an action "was removed improvidently *and without jurisdiction*" (Emphasis added). *The District Court, having found that jurisdiction existed over at least several plaintiffs, was without authority to remand the entire action to State Court.*

This court in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L.Ed.2d 542 (1976) held that a District Court exceeds its authority in remanding a case on grounds not permitted by §1447(c). 46 L.Ed. 2d at 550. In *Thermtron,* the controlling factor in the District Court's remand order was the Court's heavy docket. As this court stated,

> "This consideration however is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under §1441 and hence to the question whether this cause was removed 'improvidently and without jurisdiction' within the meaning of the statute." *Thermtron Products, Inc. v. Hermansdorfer, supra,* 46 L.Ed.2d at 550.

In the present case, the District Court based its remand order on considerations relating to the maintenance of a class action. The District Court thus allowed Rule 23 of the Federal Rules of Civil Procedure to defeat properly attached federal jurisdiction. Rule 82 of the Federal Rules of Civil Procedure clearly states that the Rules are not to be construed to affect jurisdiction:

"These Rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein."

The District Court's remand order was not authorized by the provisions of 28 U.S.C. §1447(c). The order was therefore an act in excess of the Court's jurisdiction, and, pursuant to the *Thermtron* decision, subject to review by writ of mandamus.

III.

The Court of Appeals' Denial of the Petition for Writ of Mandamus Was Contrary to and in Conflict With the Applicable Decisions of This Court.

The *Thermtron* case clearly established the principle that an order of remand entered by a District Court on grounds not authorized by 28 U.S.C. §1447(c) is subject to review by writ of mandamus:

"Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That Section and Section 1447(c) must be construed together, as this Court has said of the predecessors to these two sections in *Employers' Reinsurance Corp. v. Bryant,* 299 U.S. 374, 380-381, 81 L.Ed. 289, 57 S. Ct. 273 (1937), and *Kloeb v. Armour and Company,* 311 U.S. 199, 202, 85 L.Ed. 124, 61 S. Ct. 213 (1940). These provisions, like their predecessors, are *in pari materia* [and] are to be construed accordingly rather than as distinct enactments . . .' *Employers' Reinsurance Corp. v. Bryant, supra,* at 380, 81 L.Ed. 289, 57 S. Ct. 273. *This means that only remand orders issued under 1447c and involving the grounds specified therein—that removal was improvident*

and without jurisdiction—are immume from review under Section 1447d." (Emphasis added) *Thermtron Products, Inc. v. Hermansdorfer, supra,* 46 L.Ed.2d at 551.

After holding that §1447(d) does not bar review of remand orders not issued on grounds specified in §1447(c), this court noted

"There remains the question whether absent the bar of §1447(d) against appellate review, the writ of mandamus is an appropriate remedy to require the District Court to entertain the remanded action. *The answer is in the affirmative.*" (Emphasis added) *Thermtron Products, Inc. v. Hermansdorfer, supra,* 46 L.Ed.2d at 554.

In denying the Petition for Writ of Mandamus in the present case, the Court of Appeals acted in conflict with the *Thermtron* decision. Certiorari is therefore appropriate and is the only method available to petitioner to protect its statutory right to litigate this matter in federal court.

IV.

This Case Raises the Issue of the Proper Standard for Removal Jurisdiction Over Class Actions. This Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

This court, since the advent of Rule 23 of the Federal Rules of Civil Procedure, has been called upon to decide numerous and significant issues involving class action suits. See, for example, *Snyder v. Harris,* U.S. 332, 22 L.Ed.2d 319, 89 S.Ct. 1053 (1969); *Zahn v. International Paper Corporation,* 414 U.S.

291, 38 L.Ed.2d 511, 94 S.Ct. 505 (1971); *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140 (1974).

This case raises an important question regarding the effect of class action procedures on federal jurisdiction in the removal context, a question which has not yet been settled by this court. The issue presented is whether a District Court can remand a properly removed class action where some, but not all, members of the class meet the federal jurisdictional requirements. It is an issue of substantial importance, and one on which lower federal courts have taken differing positions. Compare, for example, *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (9th Cir. 1972) and *Knapp v. Bankers Securities Corporation,* 17 FRD 245 (E.D. Pa. 1954) with *Kinsey v. General Motors Acceptance Corp.,* 359 F.Supp. 36 (D.N.D. 1973).

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

PAUL, HASTINGS & JANOFSKY,
DANIEL H. WILLIAMS, III,
DOUGLAS C. CONROY,
ROBERT S. SPAN,
Attorneys for Petitioner
Volvo of America Corporation.

APPENDIX.

On Application of Stay.

Supreme Court of the United States.

Volvo Corporation of America, Applicant, v. William W. Schwarzer, Judge, United States District Court for the Northern District of California (Charlene P. Rosack, etc., et al., Real Parties in Interest). No. A-395.

[November 15, 1976].

Mr. Justice Rehnquist, Circuit Justice.

Applicant seeks a stay of an order of the District Court for the Northern District of California remanding this case to the California state courts. Because I believe, for the reasons outlined below, that the order of the District Court is not subject to review, the application will be denied.

This state law antitrust action was originally brought by Charlene Rosack in the California Superior Court for San Mateo County seeking damages individually and on behalf of a class of persons who purchased new Volvo automobiles from California Volvo dealers during the years 1967-1976. Defendants removed the action to the Federal District Court pursuant to 28 U. S. C. § 1441 (a), alleging that the action was within the original diversity jurisdiction of this Court as prescribed in 28 U. S. C. § 1332. Plaintiff moved to remand the action to state court on the ground, *inter alia*, that the amount in controversy did not exceed $10,000 as required by § 1332. The District Court granted the motion. Its action was premised on the belief that the case "must be treated as a class action for the purpose of determining jurisdictional issues," whereas here "it appears that only a few mem-

bers of a class estimated to have some 50,000 members meet the jurisdictional requirement." The District Court accordingly held:

> "It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn*, all of those plaintiffs would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U. S. C. § 1447 (c)."[1]

Applicant attacks this conclusion, contending that since the District Court specifically found that jurisdiction existed over "a few members of" the class, the court's order remanding the entire action was not authorized by 28 U. S. C. § 1447 (c). The flaw in this argument is that, while the District Court may have been wrong in its analysis, it clearly stated, citing to § 1447 (c), that it considered itself without jurisdiction. The District Court therefore thought it was acting in accordance with § 1447 (c), which allows a remand where an action is "removed improvidently and without jurisdiction." Review of this order, therefore, is presumptively barred by the operation of 28 U. S. C. § 1447 (d):

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

[1]The Ninth Circuit denied the petition for a Writ of Mandamus and/or Prohibition on November 11, 1976.

We held last Term in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336 (1976), where the District Court ordered a remand because of its crowded docket, that § 1447 (d) did not bar review of remand orders "issued on grounds not authorized by § 1447c," *id.,* at 343.[2] But the District Court here *did* base its order on § 1447(c). *Thermtron* is of no help to applicant as the remand was explicitly based on an allegedly erroneous finding that the court "does not have jurisdiction of this action," see 423 U. S., at 343-344. Applicant's position would mean that any allegedly erroneous application of § 1447 (c) would be reviewable by Writ of Mandamus, leaving the § 1447 (d) bar extant only in the case of allegedly proper applications of § 1447 (c); a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron.*[3]

[2]In *Thermtron,* the District Court acknowledged that the defendant had a "right" to remove the action, pursuant to 28 U. S. C. § 1441, but that this right had to be "balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action." *Id.,* at 340. As we noted, that order "was based on grounds wholly different from those upon which § 1447(c) permits remand." *Id.,* at 344.

[3]"It is unquestioned in this case and conceded by petitioner that this section prohibits review of all remand orders issued pursuant to § 1447(c) *whether erroneous or not.* . . . If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Thermtron,* 423 U. S., at 343 (emphasis added).

Since I do not believe four Members of this Court would find the order of the District Court subject to review, the application for a stay is denied.

Order.

United States Court of Appeals, for the Ninth Circuit.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants-Appellants. No. 76-3296.

Filed: November 11, 1976.

Before: WRIGHT and KENNEDY, Circuit Judges.

Upon due consideration of the petition for writ of mandamus and the opposition thereto, the petition is denied. This dissolves this Court's order of October 28, 1976 staying the district court's order of remand to state court.

/s/ Eugene A. Wright
/s/ Anthony M. Kennedy

Order.

United States Court of Appeals, for the Ninth Circuit.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. Volvo of America Corporation; Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants-Appellants. No. 76-3296.

Filed: October 28, 1976.

Before: SNEED, Circuit Judge.

In order to allow a regular motions panel of this Court to consider the petition for writ of mandamus, the district court's order of October 20, 1976 is stayed until November 12, 1976, or until further order of this Court, whichever occurs first.

/s/ Joseph T. Sneed

Order Setting Aside Magistrate's Findings and Recommendation and Remanding Action to State Court.

United States District Court, Northern District of California.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, v. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. No. C-76-0742 WWS.

Filed: Oct. 20, 1976.

This state law antitrust action was originally brought in the California Superior Court for San Mateo County. The complaint seeks damages on behalf of a named plaintiff and a class of persons who purchased new Volvo automobiles from California Volvo dealers in the period between 1967 and 1976. The complaint alleges that defendants have engaged in an unlawful conspiracy to fix the resale price of new Volvo automobiles, parts and accessories and the resale profit on used automobiles sold by Volvo dealers contrary to the provisions of California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. The prayer for relief seeks treble damages and attorney's fees in accordance with § 16750 of that Act, but does not request damages in a specified amount. Named as defendants in the complaint are Volvo of America Corporation ("Volvo"), subsidiary and parent corporations of Volvo, and a series of Doe defendants who are identified only as parties owned, dominated and controlled by each other, and who are acting as agents for and conspiring with each other.

Defendants removed the action to this Court pursuant to 28 U.S.C. § 1441(a), alleging that the action was

within the original diversity jurisdiction of this Court as prescribed in 28 U.S.C. § 1332.[1] Plaintiffs moved to remand the action to state court on the grounds that complete diversity of citizenship was lacking and that the amount in controversy did not exceed $10,000 as required by § 1332. The motion was referred to a United States Magistrate who recommended that the motion be denied. The relevant findings of the Magistrate were: (1) that since the Doe defendants could not be used to defeat diversity, complete diversity of citizenship was present among the parties; and (2) that since attorney's fees can be considered in determining the amount in controversy, more than $10,000 was in controversy among the parties. Plaintiffs now challenge these findings on appeal from the Magistrate's findings and recommendation.

I. DIVERSITY OF CITIZENSHIP.

Plaintiffs seek to defeat diversity by relying on the Doe defendants, who, they contend, are California citizens. The difficulty with this contention is that the complaint does not allege the Does' citizenship. The Does are identified in paragraph XII of the complaint as being owned, dominated, and controlled by other Does, and as agents for and conspirators with other Does. They are all alleged to be part of the combination and conspiracy described in the complaint, but are not referred to again in the remainder of the complaint. While the complaint does refer to conspiratorial activi-

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[1] 28 U.S.C. § 1332(a)(1) provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different states;".

ties of Volvo dealers, defined in paragraph XIII as being Volvo retail dealers in California, no Doe defendant is identified as a Volvo dealer. Without a proper allegation of the identity, status and citizenship of any Doe, plaintiffs' contention that there are Doe defendants who are California citizens and thus destroy diversity must be rejected. *Grigg v. Southern Pacific Co.*, 246 F.2d 613, 620 (9th Cir. 1957); *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir. 1956); see also 2A Moore's Federal Practice § 8.10 (2d ed. 1974). Accordingly, we adopt the Magistrate's finding on this issue.

II. AMOUNT IN CONTROVERSY.

Plaintiffs also challenge the Magistrate's finding that more than $10,000 is in controversy in this litigation. Plaintiffs brought this action as a class action in the state court. While the action has not yet been certified as a class action in this Court pursuant to Rule 23, Fed. R. Civ. P., it must be treated as a class action for the purpose of determining jurisdictional issues. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 951-52 (9th Cir. 1972). Defendants have not argued that the class as pleaded by plaintiffs is a sham designed to defeat federal jurisdiction nor have they challenged the treatment of this action as a bona fide class action at this stage of the proceedings.

Plaintiff Rosack alleges that her claims "are typical of those to be asserted for the other members of the plaintiff class", that the "rights of plaintiff and the class members involve common questions of law and fact which predominate over any question affecting only individual members of the class," and that a class action is superior to other methods of adjudication

of the controversy. (Complaint para. VII and VIII.) Plaintiff individually and each member of the class seek treble damages, attorneys' fees and costs.

It is plain, therefore, that this is a class action falling within Rule 23(b)(3). The Supreme Court has held only recently that to meet the jurisdictional requirement in a Rule 23(b)(3) class action, each plaintiff's claim must satisfy the jurisdictional amount. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In that case, the Supreme Court reaffirmed the historic rule that the "matter in controversy" requirement of Section 1332 must be satisfied by each member of the plaintiff class having a separate and distinct claim; plaintiffs whose claims fall short cannot satisfy the requirement by aggregation of claims:

> "None of the plaintiffs in *Snyder v. Harris* alleged a claim exceeding $10,000, but there is no doubt that the rationale of that case controls this one. As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that *any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.*" 414 U.S. at 300 (emphasis supplied).

See, also, *Snyder v. Harris*, 394 U.S. 332 (1969), and *United States v. Southern Pacific Transportation*

Co., ... F.2d ....., Nos. 74-333 and 75-1080, filed September 10, 1976, at slip opinion p. 8, n. 11 (9th Cir. 1976).

The *Zahn* principle is settled beyond dispute. The questions that arise concern the manner of its application. In the usual case, *Zahn* would simply require that members of a class whose claims fall short of the jurisdictional requirement must be dismissed:

> "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in another's coattails. 469 F.2d at 1035.' " 414 U.S. at 301.

But in *Zahn* the Supreme Court upheld the dismissal of an entire Rule 23(b)(3) class action entered on a finding that "to a legal certainty" "not every individual owner in the class had suffered . . . damages in excess of $10,000." Thus, even though some of the class members had been able to meet the jurisdictional test, the District Court nonetheless dismissed the entire action on the ground that "it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim . . ." (414 U.S. at 292)

Here we are confronted with the application of *Zahn* in the context of a removed action. While plaintiffs have not alleged any specific amount of damage claimed in the complaint, they contend on this motion that the damage claims of the individual plaintiffs resulting from the alleged price fixing could not exceed "a few dollars" in the case of parts and a "few hundred dollars" in the case of automobiles. Defendants respond that some plaintiffs were multiple purchasers of Volvos

and their claims, if they had any, might therefore well exceed $10,000. Viewing the record on this motion in the light most favorable to defendants, it appears that only a few members of a class estimated to have some 50,000 members meet the jurisdictional requirement.[2]

That conclusion is not altered by the fact that attorneys' fees which may be awarded to prevailing plaintiffs may be taken into account. Cal. Bus. & Prof. Code, § 16750. See, *Missouri State Life Ins. Co. v. Jones,* 290 U.S. 199, 202 (1933); *Stokes v. Reeves,* 245 F.2d 700, 702 (9th Cir. 1937). Attorneys fees would be awarded as a part of the separate and distinct damage recovery of each plaintiff. It appears to the Court as a legal certainty that reasonable attorneys fees when added to the damages claimed by the bulk of the plaintiffs of "a few hundred dollars" each—even after trebling—would not result in individual claims in excess of $10,000. See, *Georgia Ass'n of Ind. Ins. Ag. Inc. v. Travelers Indem. Co.,* 341 F.Supp. 841, 843-844 (N.D. Ga. 1970).[3]

It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn,* all of those plaintiffs

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[2]The Court may look at the entire record to determine whether jurisdictional defects are cured. See Wright, Federal Courts (2d Ed. 1970) 291; *Lonnquist v. J. C. Penney Co.,* 421 F.2d 597, 599 (10th Cir. 1970).

[3]While the allocation of attorneys fees to each prevailing class member's recovery is undoubtedly sound, the result would not be altered under *Zahn* if the entire amount were allocated to the named plaintiff, resulting in one more claim likely to exceed $10,000.

would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U.S.C. § 1447(c). See, *Kinsey v. General Motors Acceptance Corp.*, 359 F.Supp. 36 (D.N.D. 1973).[4]

Even if there were reason to doubt the correctness of this disposition, any doubt should be resolved in favor of remand to spare the parties proceedings which might later be nullified should jurisdiction be found to be lacking. See, *Williams v. Tri-County Community Center*, 232 F.Supp. 286, 288 (S.D. Miss. 1971), *Aff'd*, 452 F.2d 221 (5th Cir. 1971); *Lowe v. Trans World Airlines, Inc.*, 396 F.Supp. 9, 12 (S.D.N.Y. 1975); *Fernandez v. Reynolds Metals Co.*, 384 F. Supp. 1281, 1283 (S.D. Tex. 1974); *Wood v. Home Insurance Co.*, 305 F.Supp. 937, 938 (C.D. Cal. 1969).

Accordingly, the Magistrate's recommendation of June 8, 1976, is hereby set aside and the action remanded to the Superior Court in and for San Mateo County, each party to bear its own costs.

IT IS SO ORDERED.

Dated: October 19, 1976.

/s/ William W. Schwarzer
William W. Schwarzer
United States District Judge

[4]28 U.S.C. § 1441(c) would permit, but not require, the Court to retain jurisdiction of claims properly removed when joined with claims not otherwise removable. That provision does not appear applicable to a class action and most likely does not contemplate the division of a single class of plaintiffs into remandable and non-remandable subclasses. Moreover, to apply it here to justify retention of jurisdiction would simply open the door to a subsequent and inevitable dismissal of the bulk of the class members for lack of jurisdiction on the motion of the very party that invoked the jurisdiction of this Court in the first place. We are confident that this is not the result contemplated by the authors of Section 1441(c).

Magistrate's Findings and Recommendations.

United States District Court, Northern District of California.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, et al, Defendants. No. C-76-742 OJC.

Lodged: 6-8-76.

Plaintiff has moved the Court for an Order to remand this case to the Superior Court for San Mateo County. Following oral argument and after considering the files and pleadings in the case, together with the memoranda of points and authorities, I find that:

(a) There is more than $10,000 in controversy in this litigation. Such a finding is based on the fact that attorney's fees can be considered in determining whether the requisite amount in controversy is present. (See cases cited in Defendant's Brief)

(b) With respect to diversity of citizenship, plaintiff's counsel during the course of oral argument conceded that when Volvo Western merged with Volvo of America Corporation the California corporation ceased to exist as a separate entity. Such is the import of California Corporations Code Section 4116, and is supported by the case of *Asher vs. Pacific Power & Light Co.*, 249 F.Supp. 671 (No. Dist. Cal. 1965); see also *Hoefferle Truck Sales vs. Divco-Wayne*, 523

F.2d 543 (7th Cir. 1975). This narrows the claim of lack of diversity to reliance on Doe Defendants as they appear in paragraph XII of the original complaint. The parties cite cases in their briefs to argue for their respective positions.

Quoting from Moore's Federal Practice Volume 2A, Page 1664, and cases cited therein:

"* * *

> Some plaintiffs have attempted to invoke diversity jurisdiction in cases where they have joined some unknown or fictitious persons as 'John Doe' defendants. Conceivably the joinder of an actual person as a 'John Doe' defendant may be justifiable under unusual circumstances. But certainly, as a general proposition, the practice, even though permitted under state law, is unwarranted in diversity cases brought originally in the federal courts, for at least the following reasons: the district courts are courts of limited jurisdiction; a plaintiff who invokes district court jurisdiction has the duty to aver the facts requisite to that jurisdiction; under general diversity principles, previously discussed, the citizenship of each plaintiff must be diverse from that of each defendant and plaintiff's averments must so show. This cannot be truthfully shown as to fictitious persons; and usually not as to an actual but unknown person for if, in truth, his citizenship can be affirmatively alleged his name can usually be ascertained. Sound authority supports the general proposition that the 'John Doe' practice is unwarranted in diversity cases; and the action is subject to dismissal unless the John Does are eliminated or their citizenship affirmatively alleged. Where, however, the John Does are dismissed and there is complete diversity between the remaining parties, the pleading defect has not been regarded as reversible error. (footnotes omitted)

* * *"

From the foregoing, I find that plaintiff cannot rely on the Doe Defendants to defeat diversity. The pleadings simply do not establish California defendants, leaving only the non-resident corporate defendant. Thus the diversity requisite to federal court jurisdiction appears to be the fact.

In view of the foregoing, I recommend that the Court enter its Order denying plaintiff's motion to remand the case to the State Court.

Dated: June 8, 1976.

Respectfully submitted,

/s/ Owen E. Woodruff, Jr.
Owen E. Woodruff, Jr.
United States Magistrate

IT IS SO ORDERED.

Dated:

United States District Judge

Petition for Writ of Mandamus and/or Petition for Writ of Prohibition.

United States Court of Appeals, for the Ninth Circuit.

Volvo of America Corporation, Petitioner, vs. The Honorable William W. Schwarzer, Judge, United States District Court for the Northern District of California, Respondent. Charlene P. Rosick, individually and on behalf of all others similarly situated, Real Party in Interest. No. 76-3296.

Filed: October 28, 1976.

Pursuant to 28 U.S.C. § 1651 and Rule 21, Federal Rules of Appellate Procedure, petitioner VOLVO OF AMERICA CORPORATION hereby requests this Court to issue a writ of mandamus and/or writ of prohibition directed to respondent, The Honorable WILLIAM W. SCHWARZER, Judge, United States District Court for the Northern District of California, commanding respondent to set aside the order of remand and retain jurisdiction of civil action No. 76-742-WWS in the United States District Court for the Northern District of California.

I

PRELIMINARY STATEMENT

1. This case involves an action originally brought in state court, alleging violations of the California antitrust laws. Petitioner removed on the basis of diversity jurisdiction.

2. Petitioner contends that respondent's order of remand was an act in excess of the district court's jurisdiction in that it was not authorized by 28 U.S.C. 1447(c). Petitioner believes that its right to litigate

this case in federal court has wrongfully, erroneously and without proper authority been deprived by respondent. Under the recent Supreme Court decision on *Thermtron Products, Inc. v. Hermansdorfer*, ... U.S. ...., 46 L. Ed.2d 542 (1976), respondent's wrongful denial of federal jurisdiction is reversable by this court by writ of mandate.

II

STATEMENT OF FACTS

1. On March 12, 1976, an action was commenced by Charlene P. Rosack, individually and on behalf of all others similarly situated, plaintiffs, against Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc. and Does I through L, defendants, in the Superior Court of the State of California, County of San Mateo, alleging violations of the California antitrust statutes. A copy of the original complaint is attached hereto as Exhibit "A" and made a part hereof.

2. The summons and complaint were served on defendant Volvo of America Corporation (hereinafter Volvo) on March 31, 1976. No other defendants have been served.

3. On April 14, 1976, Volvo filed a petition and bond for removal in the United States District Court for the Northern District of California, removing said action to said court. A copy of the petition for removal is attached hereto as Exhibit "B" and made a part hereof.

4. On April 30, 1976, plaintiffs filed a notice of motion and motion to remand the action to state court.

5. The motion for remand was referred to the Honorable Owen E. Woodruff, Jr., United States Magistrate, for hearing and decision. On June 8, 1976, the Magistrate submitted his findings and recommendations, in which he concluded that "There is more then $10,000 in controversy in this litigation" and that "The diversity requisite to federal court jurisdiction appears to be the fact." The Magistrate's findings and recommendations are attached hereto as Exhibit "C" and made a part hereof.

6. Following the Magistrate's ruling, Volvo on June 14, 1976 filed its answer and affirmative defenses.

7. On or about June 12, 1976, plaintiffs, pursuant to Local Rule 505 of the Northern District of California filed a notice of objections to the Magistrate's findings and recommendations. Plaintiffs contended that neither the requisite diversity nor amount in controversy were present. Numerous briefs have been filed by both sides on the issues presented by the motion to remand, and petitioner will not burden this Court by attaching copies of all these briefs.

8. On October 20, 1976, the respondent entered an order setting aside the Magistrate's findings and recommendations and remanding the action to state court. A copy of said order is attached hereto as Exhibit "D" and made a part hereof. In subsequent proceedings, the effective date of this order was stayed by respondent until 4:30 p.m. on October 29, 1976. The express purpose of the stay was to afford petitioner an opportunity to seek relief from this Court.

9. Plaintiff's complaint alleges that the defendants, including petitioner, have engaged in an international combination and conspiracy to fix the prices of new

Volvo automobiles, parts and accessories offered for sale in the State of California from January, 1967 until the date of filing of the complaint. Plaintiffs also allege that defendants acted in restraint of trade through the use of tying arrangements in connection with the sale of parts and accessories for Volvo automobiles. Plaintiff Charlene P. Rosack purports to represent a class of all retail purchasers of Volvos in California during the period in controversy. Plaintiffs seek actual damages, treble damages and attorneys' fees, pursuant to *California Business and Professions Code* § 16750. No action has been stated under the federal antitrust laws.

10. Petitioner, the only defendant that has been served, has denied the allegations.

11. In the original motion for remand, plaintiff advanced several theories as basis for her contention that requisite diversity was not present. Plaintiff claimed that the existence of the Doe defendants could be relied on to defeat diversity, and the fact that defendant Volvo Western Distributing, Inc. had been a California corporation defeated diversity jurisdiction. However, the Magistrate and the respondent both clearly found that the Doe defendants could not be relied upon to defeat federal jurisdiction, and that since Volvo Western distributing, Inc. had ceased to exist as a separate corporate entity prior to the filing of complaint, there was complete diversity between plaintiffs and defendants.

12. The primary issue in the remand proceedings, and the only issue still in contention between the parties, is whether or not the jurisdictional amount in controversy is present. *The respondent in his order of remand, found that at least several plaintiffs, possibly including*

the named plaintiff, met the amount in controversy requirement by having potential claims against defendant in excess of $10,000. However, notwithstanding that finding, respondent ordered the entire action remanded to state court.

III

STATEMENT OF ISSUES PRESENTED

A. DOES 28 U.S.C. § 1447(c) PERMIT REMAND OF AN ACTION IN WHICH COMPLETE DIVERSITY EXISTS, AND WHERE THE DISTRICT COURT HAS FOUND THAT FEDERAL JURISDICTION EXISTS AS TO SOME OF THE PLAINTIFFS?

B. IN AN ACTION REMOVED FROM STATE COURT PURSUANT TO THE ORIGINAL JURISDICTION OF THE DISTRICT COURT, UNDER 28 U.S.C. § 1332, WHERE THERE IS COMPLETE DIVERSITY AND SOME PLAINTIFFS HAVE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT, DOES THE DISTRICT COURT HAVE AUTHORITY TO REMAND THE ENTIRE ACTION TO STATE COURT?

C. UNDER 28 U.S.C. § 1447(c), DOES THE DISTRICT COURT HAVE DISCRETION TO REMAND AN ENTIRE CLASS ACTION CASE TO STATE COURT NOTWITHSTANDING A FINDING BY THE COURT THAT AT LEAST SOME PLAINTIFFS HAVE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT?

D. DOES 28 U.S.C. § 1441(c) REQUIRE THE DISTRICT COURT TO RETAIN JURISDICTION OF CLAIMS PROPERLY REMOVED WHEN JOINED WITH CLAIMS NOT OTHERWISE REMOVABLE?

E. WHERE FEDERAL JURISDICTION EXISTS AS TO CERTAIN MEMBERS OF A CLASS, CAN THE COURT REMAND TO STATE COURT THE CLAIMS OF THOSE CLASS MEMBERS OVER WHICH THE COURT HAS JURISDICTION ALONG WITH THE CLAIMS OF CLASS MEMBERS OVER WHOM THE COURT HAS NO JURISDICTION?

F. IN A CLASS ACTION WHERE PLAINTIFFS CLAIM ATTORNEYS FEES PURSUANT TO STATE STATUTE AS AN ELEMENT OF DAMAGES, DOES THE POTENTIAL AWARD OF ATTORNEYS' FEES CREATE A "COMMON FUND" SO THAT AGGREGATION OF SUCH FEES IS PERMISSIBLE IN DETERMINING THE EXISTENCE OF FEDERAL JURISDICTION?

G. IN A CLASS ACTION WHERE PLAINTIFFS CLAIM TREBLE DAMAGES PURSUANT TO A STATE STATUTE AS AN ELEMENT OF DAMAGES, DOES THE POTENTIAL AWARD OF TREBLE DAMAGES CREATE A "COMMON FUND" SO THAT AGGREGATION OF SUCH DAMAGES IS PERMISSIBLE IN DETERMINING THE EXISTENCE OF FEDERAL JURISDICTION?

H. FOR PURPOSES OF DETERMINING THE EXISTENCE OF FEDERAL JURISDICTION, SHOULD AN ACTION BROUGHT BY

A PLAINTIFF "INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED" BE TREATED SOLELY AS A CLASS ACTION PRIOR TO THE DETERMINATION OF THE EXISTENCE OF ANY CLASS PURSUANT TO RULE 23, FEDERAL RULES OF CIVIL PROCEDURE?

I. IF THE DISTRICT COURT ASSUMES JURISDICTION OVER CERTAIN CLASS MEMBERS WHO, IN A DIVERSITY CASE, CAN STATE CLAIMS FOR AN AMOUNT IN CONTROVERSY EXCEEDING $10,000, DOES THE DISTRICT COURT AUTOMATICALLY, OR MAY THE DISTRICT COURT IN ITS DISCRETION, ASSUME ANCILLARY JURISDICTION OVER THE CLAIMS OF THE REMAINING CLASS MEMBERS WHO CANNOT STATE A CLAIM FOR AN AMOUNT IN CONTROVERSY IN EXCESS OF $10,000?

J. IN AN ACTION REMOVED FROM STATE COURT PURSUANT TO THE ORIGINAL JURISDICTION OF THE DISTRICT COURT UNDER 28 U.S.C. 1332, WHERE SOME PLAINTIFFS HAVE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT, AND DIVERSITY EXISTS, CAN THE DISTRICT COURT REMAND TO STATE COURT THE CLAIMS OF THOSE PLAINTIFFS WITH A CLAIM FOR AN AMOUNT IN CONTROVERSY IN EXCESS OF $10,000?

K. IN AN ACTION REMOVED FROM STATE COURT PURSUANT TO THE ORIGINAL JURISDICTION OF THE DISTRICT

COURT UNDER 28 U.S.C. 1332, WHERE SOME PLAINTIFFS HAVE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT, CAN THE DISTRICT COURT REMAND TO THE STATE COURT THE CLAIMS OF SAID PLAINTIFFS ON THE SOLE GROUND THAT SAID CLAIMS HAVE BEEN JOINED IN A PURPORTED CLASS ACTION WHERE THE REMAINDER OF THE PURPORTED CLASS MEMBERS CANNOT STATE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT IN CONTROVERSY?

IV
RELIEF SOUGHT

Petitioner seeks a writ of mandamus or in the alternative a writ of prohibition commanding respondent to set side the order of remand entered on October 20, 1976 in civil action No. 76-742-WWS, entitled Charlene P. Rosack, individually and on behalf of all others similarly situated, plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, defendants, and further commanding respondent to retain jurisdiction of said case, and further prohibiting respondent from remanding said case to the state court. Petitioner has also filed concurrently herewith an emergency motion for a stay of said remand order pending the decision by this Court on petitioner's application for said writs.

V

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

A. THIS COURT HAS AUTHORITY, BY WRIT OF MANDAMUS, TO REVIEW THE REMAND ORDER ENTERED BY THE DISTRICT COURT.

The Supreme Court of the United States has recently held that an order of remand entered by a district court on grounds not authorized by 28 U.S.C. § 1447 (c) is subject to review by writ of mandate.

Thermtron Products, Inc. v. Hermansdorfer, ... U.S. ....., 46 L. Ed.2d 542 (1976).

In *Thermtron,* the district court remanded a case on grounds other than those authorized by 28 U.S.C. § 1447(c). Section 1447(c) authorizes remand only where a case is removed "improvidently and without jurisdiction." The district court in *Thermtron* found that federal jurisdiction over the case existed, but remanded the case to state court because of the federal court's crowded docket. The defendant sought a writ of mandate from the Sixth Circuit Court of Appeals. The application for writ was denied on the grounds that 28 U.S.C. 1447 (d) precluded review of any order of remand.

The Supreme Court, however, held that the bar against review in Section 1447(d) is applicable only to remand orders properly issued on grounds authorized by 1447(c):

> "Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and section 1447(c) must be construed together, as this court has said of the predecessors to these two sections in *Employers Reinsurance Corp. v. Bryant,* 299 U.S. 374, 380-381, 81 L. Ed. 289, 57 S. Ct. 273 (1937), and *Kloeb v. Armour & Company,* 311 U.S. 199, 202, 85 L. Ed. 124, 61 S. Ct. 213 (1940). These provisions, like their predecessors, 'are *in pari materia* [and] are to be construed accordingly rather than as distinct enactments . . .' *Employers Reinsurance Corp. v. Bryant,* supra, at 380, 81 L. Ed. 289, 57 S. Ct. 273. *This means that only remand orders issued under 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under section 1447(d).*" (emphasis added).

Thermtron Products, Inc. v. Hermansdorfer, 46 L. Ed.2d at 551.

The remand order issued by respondent herein clearly shows that respondent found that jurisdiction existed as to at least several plaintiffs. Therefore, the remand of the entire action was improper and based on grounds not authorized by section 1447(c).

B. WHERE FEDERAL JURISDICTION EXISTS AS TO SOME PLAINTIFFS IN A PURPORTED CLASS ACTION DISMISSAL OR REMAND OF THE ENTIRE ACTION IS IMPROPER.

The Supreme Court has held that in cases where only one plaintiff meets the jurisdictional requirements for federal court, that plaintiff's claim is properly before the court, and the claims of other plaintiffs who do

not meet the jurisdictional requirement should be dismissed. In *Zahn v. International Paper Company,* 414 U.S. 291, 38 L. Ed.2d 511 (1973), the named plaintiffs in a purported class action each had claims satisfying the $10,000 requirement. However, they sought to represent a class where unnamed plaintiffs would not have sufficient claims. The issue presented was not whether the entire case should be dismissed for lack of federal jurisdiction, but only whether the suit should proceed as a class action. The Supreme Court held that the claims of the unnamed plaintiffs could not be aggregated with the claims of the named plaintiffs and therefore affirmed the lower court's ruling denying class certification. *However, it is clear that federal jurisdiction still existed as to those plaintiffs who had claims in excess of $10,000:*

> "As previously indicated, *Snyder* invoked the well established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim was to survive a motion to dismiss. This rule clearly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 *but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.*
>
> "This follows inescapably from the court's heavy reliance on *Clark v. Paul Gray, Inc.,* supra, where only one of several plaintiffs had a sufficiently large claim *and all other plaintiffs were dismissed from the suit.* Moreover the court cited with approval the decision in *Alvarez v. Pan American Life Insurance Company,* 375 F.2d 992 (C.A.5), *cert. den.,* 389 U.S. 827, 19 L. Ed.2d 82, 88 S. Ct. 74 (1967), which was decided after the 1966 amendments to rule 23 and which involved a class action with only one member of the class having a claim sufficient to satisfy section 1332. *Only that claim was held within the jurisdiction of the district court.*" (emphasis added).

Zahn v. International Paper Company, supra, 414 U.S. at 300, 301, 38 L. Ed.2d at 518, 519.

The result in *Zahn* was that the lower court struck all references in the complaint to persons other than the four plaintiffs who met the jurisdictional requirement. (*Zahn v. International Paper Company,* 469 F.2d 1033, 1034 (C.A.2, 1972).) Thus, it is clear that the district court found, and the Supreme Court implicitly upheld the determination that the district court had original jurisdiction over those plaintiffs with claims in excess of $10,000.

In the present case, the district court made the finding that several plaintiffs had claims in excess of $10,000. Further, the court never specifically found that the named plaintiff, Charlene Rosack, did not have a claim in excess of $10,000. As reflected in the court's remand order, page 6, footnote 3, "The result [remand] would not be altered under *Zahn* if the entire amount were allocated to the named plaintiff, resulting in one more claim likely to exceed $10,000."

The sole ground for the respondent's remand order was that a majority of the purported class plaintiffs would not have claims in excess of $10,000. However,

28 U.S.C. 1447(c) does not authorize such a ground for an order of remand. In essence, the respondent has allowed extraneous factors, such as expedition of the Rule 23 class action, to defeat federal jurisdiction which had properly attached upon removal.

Zahn clearly established that in a case where some plaintiffs meet the jurisdictional requirement, federal jurisdiction is present, at least as to those plaintiffs. Can this jurisdiction be defeated by the procedural device of a class action? *It must be remembered that a class action is merely a procedural device for the efficient and economical litigation of numerous individual action.* That principle is implicit in the court's rule in *Zahn* which require each plaintiff to satisfy the jurisdictional amount requirement.

The issue presented can be made clearer through an example. Suppose that Prestige Optics, which was shown in petitioner's affidavits in the district court to have purchased ten new Volvos in the period in controversy, had brought an individual action against Volvo making allegations identical to those in the instant case. Petitioner would clearly have had the right to remove such an action to federal court. The situation would be similar for the other multiple purchasers of Volvos. However, because the potential claim of Prestige Optics has been joined by plaintiff in her class action with claims not meeting the jurisdictional requirements, petitioner, under the respondent's ruling, would be deprived of its right to litigate in federal court. Thus, petitioner may be substantially prejudiced by plaintiff's use of the class action procedure. Such a result is not contemplated under the terms of 28 U.S.C. 1447(c).

C. PETITIONER HAD A RIGHT TO REMOVE THIS CASE TO FEDERAL COURT, AND WILL BE SUBSTANTIALLY PREJUDICED AND IRREPARABLY INJURED IF THAT RIGHT IS DEFEATED BY AN IMPROPER REMAND ORDER.

Congress has established the policy, through 28 U.S.C. 1441 that in any action over which the district court would have original jurisdiction, a defendant has a right to have his case litigated in federal court. This right is equal to the right of plaintiffs to make the initial choice of which forum in which to bring the action:

> "While the plaintiffs had a right to chose initially the state court as the forum for this action, the defendants have a subsequent equal right to resort herein to the federal court by compliance with the removal statute, transferring indirectly original jurisdiction from the state to the federal court."
>
> *Garland v. Humble Oil & Refining Company,* 306 F. Supp. 608, 610 (E.D. Tenn. 1969).

In *Gentle v. Lamb-Weston, Inc.,* 302 F. Supp. 161, 165, (N.D. Maine 1969), the court stated:

> "While the plaintiff, in good faith, may proceed in the state courts . . . it is equally true that the federal courts should not . . . prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts in proper cases to retain their own jurisdiction."

Respondent's remand order will deprive petitioner of its right to litigate in federal court. The instant

case involves numerous questions of antitrust law, and although brought under the California antitrust statute, federal antitrust decisions and authority will be controlling. (See *Chicago Title Insurance v. Great Western Financial Corp.*, 69 C.2d 305, 70 Cal. Rptr. 849 (1968).) Petitioner, a foreign corporation, would be faced with a situation of litigating complex questions of antitrust law in a state court.

VI
CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court grant petitioner's application for writ of mandamus and/or prohibition.

Respectfully submitted,

PAUL, HASTINGS & JANOFSKY
/s/ By Robert S. Span
ROBERT S. SPAN
Attorneys for Petitioner
Volvo of America Corporation

Class Action Complaint for Damages.

(Cartwright Act, Bus. & Prof. Code § 16700 et seq.)

Superior Court of the State of California, County of San Mateo.

Charlene P. Rosack, individually, and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. No. 200471.

Filed: March 12, 1976.

Plaintiffs allege:

FIRST CAUSE OF ACTION

I

Plaintiff, CHARLENE P. ROSACK, is, and at all times material herein was, a resident of the State of California, County of San Francisco.

II

Plaintiff, CHARLENE P. ROSACK, purchased a new Volvo automobile at retail from a Volvo dealer located in the State of California in August of 1972.

III

Plaintiff, CHARLENE P. ROSACK, brings this action on behalf of herself and all other persons, natural or legal, who purchased a new Volvo automobile at retail from a Volvo dealer located in the State of California during the period in controversy.

IV

Plaintiffs had no knowledge of the combination and conspiracy alleged herein, or of any facts which might have led to the discovery thereof, prior to the last year.

V

Plaintiff and the members of the plaintiff class could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of deceptive practices and techniques of secrecy employed by defendants AKTIEBOLAGET VOLVO, VOLVO OF AMERICA CORPORATION and VOLVO WESTERN DISTRIBUTING, INC. to avoid detection and fraudulently to conceal such combination and conspiracy.

VI

Plaintiff, CHARLENE P. ROSACK, is in a position similar to that of other members of the plaintiff class, which is so numerous that joinder of all parties is impracticable.

VII

The rights of plaintiff and the class members involve common questions of law and fact which predominate over any questions affecting only individual members of the class; and this class action is superior to other methods for the fair and efficient adjudication of the controversy herein described.

VIII

The claims of plaintiff are typical of those to be asserted for the other members of the plaintiff class, and said plaintiff will fairly and adequately protect the interests of the class. Individual actions by class members are not feasible since the average claim for each class member would not be in an amount sufficient to justify individual prosecution.

IX

AKTIEBOLAGET VOLVO (hereinafter referred to as "A B Volvo"), Gothenburg, Sweden, is made a

defendant herein. A B Volvo is an alien corporation. During the period in controversy and continuing thereafter to and including the date of filing of this complaint, A B Volvo was the parent company and owner of 100% of the capital stock of, and dominated and controlled the operations, management and policies of, defendants VOLVO OF AMERICA CORPORATION and VOLVO WESTERN DISTRIBUTING, INC. In addition, A B Volvo manufactures the Volvo automobiles sold and distributed by other defendants.

X

VOLVO OF AMERICA CORPORATION (hereafter referred to as "Volvo of America") is made a defendant herein. Volvo of America is a corporation organized and existing under the laws of the State of Delaware, with its national headquarters in Rockleigh, New Jersey. Volvo of America is, and at all times material hereto was, licensed to do and doing business in California, and in San Mateo County. During the period in controversy and continuing thereafter to and including the date of filing of this complaint, Volvo of America was wholly owned by A B Volvo and was not an independent subsidiary. A B Volvo dominated and controlled the operations, management and policies of Volvo of America. Volvo of America is and at all times material hereto was the importer and national distributor of Volvo automobiles, parts and accessories in the United States. Volvo of America sells Volvo automobiles, parts and accessories to regional distributors for resale in all 50 states, including the State of California.

XI

VOLVO WESTERN DISTRIBUTING, INC., (hereinafter "VWD") is made a defendant herein. VWD was a corporation organized and existing under the laws of the State of California with its principal place of business in the State of California and regional offices in San Mateo County; and at all times material herein maintained and conducted a substantial amount of business in San Mateo County. From at least January, 1967, and continuing thereafter to and including the date of filing of this complaint, VWD was a wholly owned subsidiary of Volvo of America, which, with A B Volvo, dominated and controlled the operations, management and policies of VWD. VWD at all times material hereto was the distributor of Volvo automobiles, parts and accessories in the "Western Region" of the United States comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington. VWD purchases Volvo automobiles, parts and accessories for resale from Volvo of America.

XII

The true names or capacities, whether individual, corporate, associate or otherwise, of the defendants DOES I through L are unknown to plaintiffs who therefore sue them by such fictitious names, and plaintiffs will amend this complaint to show their true names and capacities when they have been ascertained. Plaintiffs are informed and believe and thereon allege that each of the fictitiously named defendants is indebted to plaintiffs as hereinafter alleged, and that DOES I through V were owned, dominated and controlled by DOES VI through X; DOES XI through XV acted as agents for and in conspiring with DOES

XVI through XX; and that all of them were part of the combination and conspiracy hereinafter alleged.

XIII

Defendant A B Volvo manufactures Volvo automobiles, parts and accessories therefor, in Sweden, The exclusive importer for said Volvo automobiles, parts and accessories is defendant Volvo of America Corporation. Defendant Volvo of America Corporation in turn distributes and sells the imported Volvo automobiles, parts and accessories to various wholly owned regional distributing corporations. VWD is the wholly owned regional distributor for the "Western Region" of the United States, including California. VWD sells Volvo automobiles, parts and accessories to retail Volvo dealers in California, for retail sale by such dealers to the consuming public of which the plaintiff, and the class represented by plaintiff, are members. (All references to "Volvo dealers" shall hereinafter mean retail Volvo dealers in California unless the context dictates otherwise.)

XIV

Beginning at least as early as January, 1967, and continuing thereafter until the filing date of this complaint, defendants A B Volvo, Volvo of America and VWD in combination with the Volvo dealers have engaged in unlawful combination and conspiracy to establish, maintain, control, fix, peg and stabilize the resale price of new Volvo automobiles, parts and accessories, and the resale profit on used automobiles, sold by Volvo dealers in violation of the Cartwright Act (Bus. & Prof. Code § 16700 et seq.).

XV

The aforesaid combination and conspiracy consisted of a continuing agreement and concert of action among defendants A B Volvo, Volvo of America and VWD, together with the Volvo dealers, the substantial terms of which were that said defendants, and each of them, would, by devices and practices, require, ensure and maintain compliance by and cooperation of Volvo dealers with including, but not limited to, the following practices:

(a) Volvo dealers would sell and advertise for sale Volvo automobiles, parts and accessories at prices fixed by defendants A B Volvo, Volvo of America and VWD, and each of them;

(b) Volvo dealers would only advertise the suggested retail prices fixed by defendants when prices were included in dealer advertisements for new Volvos;

(c) Volvo dealers would refrain from selling to or through automobile brokers or discount houses; and

(d) Volvo dealers would refrain from selling, advertising, and otherwise soliciting customers for Volvo automobiles outside the respective marketing areas of said dealers as designated by defendants A B Volvo, Volvo of America and VWD, and each of them.

XVI

The unlawful combination and conspiracy hereinbefore alleged has had the following effects, among others:

(a) Volvo dealer prices of Volvo automobiles, parts and accessories have been established, controlled, fixed, maintained, pegged and stabilized at noncompetitive and artificial levels;

(b) Price competition among Volvo dealers in the sale and distribution of Volvo automobiles, parts and accessories has been suppressed and eliminated;

(c) Consumers have been deprived of the opportunity of buying Volvo automobiles, parts and accessories manufactured and/or distributed by defendants A B Volvo, Volvo of America and VWD at competitive prices;

(d) Automobile brokers and discount houses have been generally unable to purchase Volvo automobiles, parts and accessories;

(e) Volvo dealers have been prevented from selling Volvo automobiles, parts and accessories at prices, to purchasers, and into territories, of their own choice; and

(f) Competition generally in the sale of Volvo automobiles, parts and accessories has been restrained, restricted, suppressed, limited, controlled, prevented, and eliminated.

XVII

As a direct result of the unlawful conduct of defendants A B Volvo, Volvo of America and VWD in combination with the Volvo dealers alleged herein, plaintiff and other members of the plaintiff's class have been unable to purchase at retail new Volvo automobiles, parts and accessories at prices determined by free and open competition, and, at all times material herein, the retail prices of new Volvo automobiles, parts and accessories purchased by plaintiff and other members of plaintiff's class were higher than they would have been absent the unlawful acts, combination and conspiracy herein alleged.

XVIII

Plaintiff, and other members of plaintiff's class, have been injured in their business and property by reason of these violations in an amount presently unknown. Plaintiffs pray leave to amend according to proof.

WHEREFORE, plaintiff, individually, and each and every member of the plaintiff class, prays judgment against defendants, and each of them, as hereinafter set forth.

SECOND CAUSE OF ACTION

I

Plaintiffs hereby incorporate and reallege Paragraphs I through XVIII of the First Cause of Action.

II

Defendants A B Volvo, Volvo of America and VWD, and each of them, in combination with Volvo dealers further acted in restraint of trade through tying arrangements, requiring Volvo dealers to purchase parts and accessories for Volvo automobiles from these defendants thereby preventing competition in manufacturing, marketing, transportation, sale or purchase of said parts and accessories.

III

Plaintiff, and members of plaintiff's class, were thereby required to buy Volvo parts and accessories as a condition of buying Volvo automobiles. Defendants A B Volvo, Volvo of America, VWD, and each of them, combined and conspired by continuing agreement and concert of action to sell to plaintiff, and members of plaintiff's class, only those parts and accessories provided by these defendants, and at resale prices established, controlled, fixed, maintained, pegged and stabilized by them.

IV

The unlawful combination and conspiracy hereinbefore alleged has had the following effects, among others:

(a) Volvo dealer retail prices of parts and accessories for Volvo automobiles have been fixed, maintained, pegged and stabilized at noncompetitive and artificial levels;

(b) Price competition among Volvo dealers in the sale of parts and accessories for Volvo automobiles has been suppressed and eliminated;

(c) Plaintiffs have been deprived of the choice of competing products suitable for Volvo automobiles manufactured and distributed by others, and the beneficial impact upon price inherent in increased competition; and

(d) Competition generally in the sale of parts and accessories for Volvo automobiles has been restrained, restricted, suppressed, limited, controlled, prevented and eliminated.

V

Plaintiff, and other members of plaintiff's class, have been injured in their business and property by reason of these violations in an amount presently unknown. Plaintiffs pray leave to amend according to proof.

WHEREFORE, plaintiff, individually, and each and every member of the plaintiff class, pray judgment against defendants, and each of them, in accordance with the provisions of Section 16750 of the Business and Professions Code, as follows:

1. For three times the damages sustained;
2. For reasonable attorney's fees;
3. For costs of suit incurred herein; and

4. For such other and further relief as the Court deems just and proper.

DATED: March 10, 1976.

COTCHETT, HUTCHINSON & DYER
BROWN, WRIGHT & KAUFMAN
CARTWRIGHT, SAROYAN, MARTIN & SUCHERMAN
/s/ By Harold C. Wright
HAROLD C. WRIGHT
Attorneys for Plaintiffs

VERIFICATION

I am an attorney at law admitted to practice before all courts of the State of California and have my office in Santa Clara County, California, and am one of the attorneys for the plaintiff in the above entitled action; that plaintiff is unable to make the verification because plaintiffs are absent from said county and for that reason affiant makes this verification on plaintiff's behalf; that I have read the foregoing CLASS ACTION COMPLAINT FOR DAMAGES and am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on March 10, 1976, at San Mateo, California.

/s/ Harold C. Wright
HAROLD C. WRIGHT

Notice of Filing of Petition and Bond for Removal.

United States District Court, Northern District of California.

Charlene P. Rosack, individually, and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. Case No. C76 742 OJC.

Filed: April 14, 1976.

TO PLAINTIFF AND TO HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 14, 1976, a Petition and Bond for Removal, true copies of which are attached to the copy of this Notice served upon you, were filed in the United States District Court for the Northern District of California.

Dated: April 14, 1976.

PAUL, HASTINGS & JANOFSKY
DAVID B. HARRIMAN
/s/ By David B. Harriman
Attorneys for Petitioner and Defendant, Volvo of America Corporation

Petition for Removal of Civil Action.

United States District Court, Northern District of California.

Charlene P. Rosack, individually, and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. Anti-trust Case No. C76-742 OJC.

TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

The petition for removal of this suit from the Superior Court of the State of California for the County of San Mateo to the United States District Court for the Northern District of California, respectfully shows to this honorable Court:

1. This suit is one which may be removed to this Court by petitioner herein since the action is one in which this Court has original jurisdiction pursuant to Title 28, U.S. Code Section 1332, as it is a civil action wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between citizens of different states. Accordingly, by virtue of provisions of Title 28, U.S. Code Section 1441(a), this action may be removed to this Court.

2. Petitioner is the sole defendant served in a civil action brought against it in the Superior Court of the State of California for the County of San Mateo entitled Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo,

Volvo Western Distributing, Inc., and Does I through L, Defendants, San Mateo Superior Court Case No. 200471.

3. The summons and complaint in the aforesaid action was served on petitioner Volvo of America Corporation's authorized agent for service on March 31, 1976. A purported service of process was attempted on petitioner on March 15, 1976, which service has been challenged by petitioner on a motion to quash in the Superior Court for the County of San Mateo. No summons or complaint have been served on defendants Volvo Western Distributing, Inc. or Aktiebolaget Volvo. Defendants Does I through L are fictitious defendants. Attached hereto are copies of all pleadings and orders purportedly served on petitioner in said action.

4. At the time this suit was commenced, plaintiff was a resident of the State of California.

5. At the time this suit was commenced, petitioner was and still is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business located in the State of New Jersey. Defendant Aktiebolaget Volvo was and still is an alien corporation located in Gothenburg, Sweden. Defendant Volvo Western Distributing, Inc. ceased to exist as a separate corporate entity and was dissolved on December 31, 1975.

6. None of the defendants is a citizen of the State of California.

7. This petition is filed within thirty days after service of the summons and complaint on petitioner herein. The time for filing this petition under the statutes of the United States has not expired.

8. Petitioner files and presents herewith a bond with good and sufficient surety in the sum of $250.00

as provided by Title 28, U.S. Code Section 1446(d), that it will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this suit is not removable or is improperly removed.

WHEREFORE, petitioner prays that said action No. 200471 be removed from the Superior Court of the State of California for the County of San Mateo to this Court.

Dated: April 13, 1976.

PAUL, HASTINGS & JANOFSKY
DAVID B. HARRIMAN
/s/ By David B. Harriman
David B. Harriman
Attorneys for Petitioner
Volvo of America Corporation

VERIFICATION

State of California, County of Los Angeles—ss

DAVID B. HARRIMAN, being first duly sworn, deposes and says that he is one of the attorneys for petitioner herein, that he has read the foregoing Petition for Removal and he is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true.

Subscribed and sworn to before me on April 13, 1976.

/s/ David B. Harriman
David B. Harriman

/s/ Roslyn E. Klaus
Notary Public in and for said
County and State

Magistrate's Findings and Recommendations.

United States District Court, Northern District of California.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, et al, Defendants. No. C-76-742 OJC.

Plaintiff has moved the Court for an Order to remand this case to the Superior Court for San Mateo County. Following oral argument and after considering the files and pleadings in the case, together with the memoranda of points and authorities, I find that:

(a) There is more than $10,000 in controversy in this litigation. Such a finding is based on the fact that attorney's fees can be considered in determining whether the requisite amount in controversy is present. (See cases cited in Defendant's Brief)

(b) With respect to diversity of citizenship, plaintiff's counsel during the course of oral argument conceded that when Volvo Western merged with Volvo of America Corporation the California corporation ceased to exist as a separate entity. Such is the import of California Corporations Code Section 4116, and is supported by the case of *Asher vs. Pacific Power & Light Co.*, 249 F.Supp. 671 (No. Dist. Cal. 1965); see also *Hoefferle Truck Sales vs. Divco-Wayne*, 523 F.2d 543 (7th Cir. 1975). This narrows the claim of lack of diversity to reliance on Doe Defendants as they appear in paragraph XII of the original complaint. The parties cite cases in their briefs to argue for their respective positions.

Quoting from Moore's Federal Practice Volume 2A, Page 1664, and cases cited therein:

"* * *

Some plaintiffs have attempted to invoke diversity jurisdiction in cases where they have joined some unknown or fictitious persons as 'John Doe' defendants. Conceivably the joinder of an actual person as a 'John Doe' defendant may be justifiable under unusual circumstances. But certainly, as a general proposition, the practice, even though permitted under state law, is unwarranted in diversity cases brought originally in the federal courts, for at least the following reasons: the district courts are courts of limited jurisdiction; a plaintiff who invokes district court jurisdiction has the duty to aver the facts requisite to that jurisdiction; under general diversity principles, previously discussed, the citizenship of each plaintiff must be diverse from that of each defendant and plaintiff's averments must so show. This cannot be truthfully shown as to fictitious persons; and usually not as to an actual but unknown person for if, in truth, his citizenship can be affirmatively alleged his name can usually be ascertained. Sound authority supports the general proposition that the 'John Doe' practice is unwarranted in diversity cases and the action is subject to dismissal unless the John Does are eliminated or their citizenship affirmatively alleged. Where, however, the John Does are dismissed and there is complete diversity between the remaining parties, the pleading defect has not been regarded as reversible error. (footnotes omitted)

* * *"

From the foregoing, I find that plaintiff cannot rely on the Doe Defendants to defeat diversity. The pleadings simply do not establish California defendants, leaving only the non-resident corporate defendant. Thus the diversity requisite to federal court jurisdiction appears to be the fact.

In view of the foregoing, I recommend that the Court enter its Order denying plaintiff's motion to remand the case to the State Court.

Dated: June 8, 1976.

Respectfully submitted,

/s/ Owen E. Woodruff, Jr.
Owen E. Woodruff, Jr.
United States Magistrate

IT IS SO ORDERED.

Dated: .....

United States District Judge

Order Setting Aside Magistrate's Findings and Recommendation and Remanding Action to State Court.

United States District Court, Northern District of California.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, v. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. No. C-76-0742 WWS.

Filed: Oct. 20, 1976.

This state law antitrust action was originally brought in the California Superior Court for San Mateo County. The complaint seeks damages on behalf of a named plaintiff and a class of persons who purchased new Volvo automobiles from California Volvo dealers in the period between 1967 and 1976. The complaint alleges that defendants have engaged in an unlawful conspiracy to fix the resale price of new Volvo automobiles, parts and accessories and the resale profit on used automobiles sold by Volvo dealers contrary to the provisions of California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. The prayer for relief seeks treble damages and attorney's fees in accordance with § 16750 of that Act, but does not request damages in a specified amount. Named as defendants in the complaint are Volvo of America Corporation ("Volvo"), subsidiary and parent corporations of Volvo, and a series of Doe defendants who are identified only as parties owned, dominated and controlled by each other, and who are acting as agents for and conspiring with each other.

Defendants removed the action to this Court pursuant to 28 U.S.C. § 1441(a), alleging that the action

was within the original diversity jurisdiction of this Court as prescribed in 28 U.S.C. § 1332.[1] Plaintiffs moved to remand the action to state court on the grounds that complete diversity of citizenship was lacking and that the amount in controversy did not exceed $10,000 as required by § 1332. The motion was referred to a United States Magistrate who recommended that the motion be denied. The relevant findings of the Magistrate were: (1) that since the Doe defendants could not be used to defeat diversity, complete diversity of citizenship was present among the parties; and (2) that since attorney's fees can be considered in determining the amount in controversy, more than $10,000 was in controversy among the parties. Plaintiffs now challenge these findings on appeal from the Magistrate's findings and recommendation.

I. DIVERSITY OF CITIZENSHIP.

Plaintiffs seek to defeat diversity by relying on the Doe defendants, who, they contend, are California citizens. The difficulty with this contention is that the complaint does not allege the Does' citizenship. The Does are identified in paragraph XII of the complaint as being owned, dominated, and controlled by other Does, and as agents for and conspirators with other Does. They are all alleged to be part of the combination and conspiracy described in the complaint, but are not referred to again in the remainder of the complaint. While the complaint does refer to conspira-

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[1] 28 U.S.C. § 1332(a)(1) provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different states;"

torial activities of Volvo dealers, defined in paragraph XIII as being Volvo retail dealers in California, no Doe defendant is identified as a Volvo dealer. Without a proper allegation of the identity, status and citizenship of any Doe, plaintiffs' contention that there are Doe defendants who are California citizens and thus destroy diversity must be rejected. *Grigg v. Southern Pacific Co.*, 246 F.2d 613, 620 (9th Cir. 1957); *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir. 1956); see also 2A Moore's Federal Practice § 8.10 (2d ed. 1974). Accordingly, we adopt the Magistrate's finding on this issue.

II. AMOUNT IN CONTROVERSY.

Plaintiffs also challenge the Magistrate's finding that more than $10,000 is in controversy in this litigation. Plaintiffs brought this action as a class action in the state court. While the action has not yet been certified as a class action in this Court pursuant to Rule 23, Fed. R. Civ. P., it must be treated as a class action for the purpose of determining jurisdictional issues. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 951-52 (9th Cir. 1972). Defendants have not argued that the class as pleaded by plaintiffs is a sham designed to defeat federal jurisdiction nor have they challenged the treatment of this action as a bona fide class action at this stage of the proceedings.

Plaintiff Rosack alleges that her claims "are typical of those to be asserted for the other members of the plaintiff class", that the "rights of plaintiff and the class members involve common questions of law and fact which predominate over any question affecting only individual members of the class," and that a class action is superior to other methods of adjudication

of the controversy. (Complaint para. VII and VIII.) Plaintiff individually and each member of the class seek treble damages, attorneys' fees and costs.

It is plain, therefore, that this is a class action falling within Rule 23(b)(3). The Supreme Court has held only recently that to meet the jurisdictional requirement in a Rule 23(b)(3) class action, each plaintiff's claim must satisfy the jurisdictional amount. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In that case, the Supreme Court reaffirmed the historic rule that the "matter in controversy" requirement of Section 1332 must be satisfied by each member of the plaintiff class having a separate and distinct claim; plaintiffs whose claims fall short cannot satisfy the requirement by aggregation of claims:

> "None of the plaintiffs in *Snyder v. Harris* alleged a claim exceeding $10,000, but there is no doubt that the rationale of that case controls this one. As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that *any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.*" 414 U.S. at 300 (emphasis supplied).

See, also, *Snyder v. Harris*, 394 U.S. 332 (1969), and *United States v. Southern Pacific Transportation*

Co., ... F.2d ...., Nos. 74-333 and 75-1080, filed September 10, 1976, at slip opinion p. 8, n. 11 (9th Cir. 1976).

The *Zahn* principle is settled beyond dispute. The questions that arise concern the manner of its application. In the usual case, *Zahn* would simply require that members of a class whose claims fall short of the jurisdictional requirement must be dismissed:

> "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in another's coattails. 469 F.2d at 1035.'" 414 U.S. at 301.

But in *Zahn* the Supreme Court upheld the dismissal of an entire Rule 23(b)(3) class action entered on a finding that "to a legal certainty" "not every individual owner in the class had suffered . . . damages in excess of $10,000." Thus, even though some of the class members had been able to meet the jurisdictional test, the District Court nonetheless dismissed the entire action on the ground that "it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim . . ." (414 U.S. at 292).

Here we are confronted with the application of *Zahn* in the context of a removed action. While plaintiffs have not alleged any specific amount of damage claimed in the complaint, they contend on this motion that the damage claims of the individual plaintiffs resulting from the alleged price fixing could not exceed "a few dollars" in the case of parts and a "few hundred dollars" in the case of automobiles. Defendants respond that some plaintiffs were multiple purchasers of Volvos and their claims, if they had any, might therefore

well exceed $10,000. Viewing the record on this motion in the light most favorable to defendants, it appears that only a few members of a class estimated to have some 50,000 members meet the jurisdictional requirement.[2]

That conclusion is not altered by the fact that attorneys' fees which may be awarded to prevailing plaintiffs may be taken into account. Cal. Bus. & Prof. Code, § 16750. See, *Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199, 202 (1933); *Stokes v. Reeves*, 245 F.2d 700, 702 (9th Cir. 1937). Attorneys fees would be awarded as a part of the separate and distinct damage recovery of each plaintiff. It appears to the Court as a legal certainty that reasonable attorneys fees when added to the damages claimed by the bulk of the plaintiffs of "a few hundred dollars" each—even after trebling—would not result in individual claims in excess of $10,000. See, *Georgia Ass'n of Ind. Ins. Ag. Inc. v. Travelers Indem. Co.*, 341 F.Supp. 841, 843-844 (N.D. Ga. 1970).[3]

It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn*, all of those plaintiffs would have to be dismissed and, if feasible, a class

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[2]The Court may look at the entire record to determine whether jurisdictional defects are cured. See Wright, Federal Courts (2d Ed. 1970) 291; *Lonnquist v. J. C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970).

[3]While the allocation of attorneys fees to each prevailing class member's recovery is undoubtedly sound, the result would not be altered under *Zahn* if the entire amount were allocated to the named plaintiff, resulting in one more claim likely to exceed $10,000.

substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U.S.C. § 1447(c). See, *Kinsey v. General Motors Acceptance Corp.*, 359 F.Supp. 36 (D.N.D. 1973).[4]

Even if there were reason to doubt the correctness of this disposition, any doubt should be resolved in favor of remand to spare the parties proceedings which might later be nullified should jurisdiction be found to be lacking. See, *Williams v. Tri-County Community Center*, 232 F.Supp. 286, 288 (S.D. Miss. 1971), *Aff'd*, 452 F.2d 221 (5th Cir. 1971); *Lowe v. Trans World Airlines, Inc.*, 396 F.Supp. 9, 12 (S.D.N.Y. 1975); *Fernandez v. Reynolds Metals Co.*, 384 F.Supp. 1281, 1283 (S.D. Tex. 1974); *Wood v. Home Insurance Co.*, 305 F.Supp. 937, 938 (C.D. Cal. 1969).

Accordingly, the Magistrate's recommendation of June 8, 1976, is hereby set aside and the action remanded to the Superior Court in and for San Mateo County, each party to bear its own costs.

IT IS SO ORDERED.

Dated: October 19, 1976.

/s/ William W. Schwarzer
William W. Schwarzer
United States District Judge

[4]28 U.S.C. § 1441(c) would permit, but not require, the Court to retain jurisdiction of claims properly removed when joined with claims not otherwise removable. That provision does not appear applicable to a class action and most likely does not contemplate the division of a single class of plaintiffs into remandable and non-remandable subclasses. Moreover, to apply it here to justify retention of jurisdiction would simply open the door to a subsequent and inevitable dismissal of the bulk of the class members for lack of jurisdiction on the motion of the very party that invoked the jurisdiction of this Court in the first place. We are confident that this is not the result contemplated by the authors of Section 1441(c).

Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Mandamus and/or Prohibition.

United States Court of Appeals, for the Ninth Circuit.

Volvo of America Corporation, Petitioner, vs. The Honorable William W. Schwarzer, Judge, United States District Court for the Northern District of California, Respondent. Charlene P. Rosack, individually and on behalf of all others similarly situated, Real Parties in Interest. No. 76-3296.

In addition to the authorities cited in the Petition for Writ of Mandamus and/or Petition for Writ of Prohibition, filed by Volvo of America Corporation (Volvo), petitioner respectfully requests that the Court consider the following authorities:

I

THE NINTH CIRCUIT HAS STATED THAT IN A CLASS ACTION WHERE SOME PLAINTIFFS CAN MEET THE JURISDICTIONAL REQUIREMENTS AND SOME CANNOT, FEDERAL JURISDICTION IS PRESENT.

The issue before this Court is virtually identical to the issue presented in the case of *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972). In *Inglewood*, this court dealt with the question of federal jurisdiction over a class action in the context of a motion to dismiss an action originally brought

in the federal court. The instant case involves removal, but the basic issue of whether federal jurisdiction exists is the same.

In *Inglewood,* this court was confronted with a situation "in which some plaintiffs probably can meet the jurisdictional requirements, and some probably cannot." 451 F.2d at 952. This court stated the appropriate rule to be applied in such a situation as follows:

> "*When faced with a class action where the pleadings satisfy the jurisdictional amount requirements for some indeterminate number of class members, and do not satisfy them for the rest of the members, it seems to us the better practice not to dismiss the entire action at the pleading stage.* See *Town of East Haven v. Eastern Airlines, Inc.,* 282 F. Supp. 507, 516 (D. Conn. 1968). Rather, the court should decide for the individual plaintiffs which can recover and which cannot. Once these matters are resolved, the court can begin seeking a more substantial showing from the plaintiffs as to the type of proof they will be able to present. Whenever appropriate, the court can dismiss the complaints as to those parties who are clearly shown to be unable to meet the requirements of jurisdictional amount." (emphasis added) *City of Inglewood,* supra, at 953-954.

Other courts have recognized this principle. For example, in *Knapp v. Bankers Securities Corporation,* 17 FRD 245 (E.D. Pa. 1954), in a shareholders suit for direct declaration of dividends, the court found the class action there to be "spurious" and disallowed aggregation to reach the federal jurisdictional amount.

However, the court denied a motion to dismiss the action because it found that some plaintiffs had claims in excess of the jurisdictional amount:

> "However, in the present case it appears that the amount claimed by some of the plaintiffs is certainly in excess of [the jurisdictional amount] with the result that *this complaint cannot be dismissed on jurisdictional grounds.*" (emphasis added) 17 FRD at 247.

In the instant case, the District Court found that the jurisdictional amount existed as to some plaintiffs. Having found such jurisdiction, the Court's order of remand was an act in excess of its jurisdiction and contrary to the provisions of 28 U.S.C. 1447(c).

II

THE DISTRICT COURT BASED ITS REMAND ORDER ON PROCEDURAL GROUNDS NOT AUTHORIZED BY 28 U.S.C. 1447(c).

The Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer,* .... U.S. ...., 46 L.Ed.2d 542 (1976), held that an order of remand must be based on the grounds authorized by 28 U.S.C. 1447(c). An order not so grounded is reviewable by writ of mandamus.

The District Court has allowed procedural considerations, not authorized by Section 1447(c), to defeat properly attached federal jurisdiction. The basis for the District Court's order of remand was that a majority of the potential class members would not meet federal jurisdictional requirements. In essence, the Court used Rule 23 of the Federal Rules of Civil Procedure to defeat jurisdiction.

In a different context, the Third Circuit held that "a mistaken idea of procedure" is not proper ground for remand.

> *Bankers Securities Corp. v. Insurance Equities Corp.*, 85 F.2d 855, 859 (1936); see also cases cited therein.

Further, Rule 82 of the Federal Rules of Civil Procedure clearly states that the rules are not to be construed to affect jurisdiction:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

III
CONCLUSION

As has been shown, the District Court found that federal jurisdiction existed in the instant case but then remanded on grounds not authorized by the applicable statute. It is respectfully submitted therefore that the writ of mandamus and/or prohibition should issue directing the respondent Court to vacate its remand order and maintain jurisdiction over the action.

DATED: November 3, 1976.

Respectfully submitted,

PAUL, HASTINGS & JANOFSKY
DANIEL H. WILLIAMS, III
DOUGLAS C. CONROY
ROBERT S. SPAN
/s/ By Robert S. Span
ROBERT S. SPAN

Attorneys for Petitioner